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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 626

DEANE HILL COUNTRY CLUB, INC.,
Petitioner,

vs.

CITY OF KNOXVILLE and GEORGE F. McCANLESS,
ATTORNEY GENERAL OF THE
STATE OF TENNESSEE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Deane Hill Country Club, Inc. prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this cause June 16, 1967.

OPINION BELOW

The opinion of the District Court is annexed as appendix, at A1. Opinion and decision of the United States Court of Appeals for the Sixth Circuit is annexed as appendix, at A5.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Did the United States Court of Appeals for the Sixth Circuit err in affirming the action of the District Court which summarily dismissed the complaint on motion?

Petitioner insists this question should be answered "yes"; and respondents will insist it should be answered "no".

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment to the Constitution of the United States, pertinent portions of which provide:

> ". . . nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment to the Constitution of the United States pertinent portions of which provide:

> ". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

FEDERAL STATUTES INVOLVED

28 U.S.C. 1343(3), which provides as follows:

> "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> * * *
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress provided for equal rights of citizens or of all persons within the jurisdiction of the United States."

28 U.S.C. 2201, which provides as follows:

> "In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

STATE STATUTES INVOLVED

6-308, et seq., Tennessee Code Annotated (A13).

CITY ORDINANCE INVOLVED

City of Knoxville, Ordinance No. 3050 (A16).

STATEMENT OF THE CASE

Petitioner corporation filed this action on behalf of itself and others similarly situated, against respondent municipality, City of Knoxville, and respondent George F. McCanless, Attorney General of the State of Tennessee, a nominal party, because the constitutionality of a public act

of the Legislature of Tennessee is involved. On November 22, 1960, respondent municipality adopted Ordinance No. 3050 (A16), annexing approximately 150 acres, including a club house and golf course belonging to petitioner to the territorial confines of respondent City. This action contests the constitutionality of 6-308, et seq., Tennessee Code Annotated (A13), under which respondent City adopted said annexation ordinance. The complaint averred that the State statute and the City ordinance were illegal and void in that they violated the Fifth and Fourteenth Amendments to the Constitution of the United States by depriving petitioner of property without due process of law; by taking petitioner's property for public use without compensation; and by denying to petitioner and those similarly situated equal protection of the law. These constitutional rights were violated because said annexation ordinance was enacted by members of the Council of respondent City who were not elected representatives, nor in any wise representatives of petitioner when the ordinance was enacted; and petitioner was given no voice, choice, or vote as to whether petitioner's property would be annexed to the territory of respondent City; and the act and ordinance granted respondent City unlimited power and right to withhold forever from the area annexed all municipal functions and services while at the same time imposing upon petitioner and others similarly situated the same rate of taxation as those within the old corporate limits. Respondent City at the time of annexation had an outstanding bonded indebtedness of $33,238,000.00, and by reason of annexation, petitioner to date had paid to respondent City in taxes, the sum of $3,249.71 in 1963, $3,249.71 in 1964, and $3,278.21 in 1965. That a substantial portion of these taxes was earmarked and will be earmarked in the future, to apply to debt service of this huge bonded indebtedness. Petitioner received no benefit from said bonded indebtedness pre-existing annexation, and

the improvements and projects for which these bonds were issued had long since ceased to exist. That much of the bonded indebtedness pre-existing annexation had been used for operating expenses of the old municipal corporation. Said pre-existing bonded indebtedness saddled on petitioner and others similarly situated, constituted a lien, even ahead of mortgages, on petitioner's property and annexation, therefore, constituted a taking of petitioner's property, and that of others similarly situated, without due process of law, and a taking for public use without just compensation, and was a denial to petitioner and others similarly situated of the equal protection of the law. By reason of said annexation, petitioner and others similarly situated had imposed upon them a pre-existing set of ordinances and a municipal charter which in effect controlled practically every facet of one's private and public life, whereas, petitioner and such others had had no choice, voice or vote as to whether said ordinances and charter would affect them, all in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

Petitioner prayed judgment of the Court upon the complaint; that a judgment be entered declaring the ordinance and State statute illegal and void, as being in violation of the Fifth and Fourteenth Amendments; that the Court declare and adjudge respondent City had illegally and unconstitutionally collected the taxes set forth in the complaint, and that petitioner have a monetary judgment for said illegally exacted taxes.

An amended complaint was filed, adding a prayer that the Court enjoin respondent City from further enforcing said annexation ordinance and from levying any taxes by reason of its enactment, and prayed that a three-Judge court be convened to hear the cause. This request was denied by the District Court.

Respondent McCanless, Attorney General of the State of Tennessee, filed an answer on the merits.

Respondent City filed a motion to dismiss the complaint on the grounds: (1) the Court lacked jurisdiction of the subject matter, in that the claim does not arise under the constitution, laws or treaties of the United States, and (2) that the complaint fails to state a claim against respondent City upon which relief can be granted.

The District Court dismissed the complaint upon the motion of respondent City (A4).

No plea of *res judicata* was ever filed by either respondent.

The United States Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court dismissing the case, on the following grounds: (1) that this is an action under 42 U.S.C. 1983 and cannot be maintained because a municipality cannot be sued under that statute, because neither a municipality nor the State of Tennessee is a "person" within the meaning of that section; (2) that *Hunter* v. *City of Pittsburgh*, 207 U.S. 161 (1907), precludes constitutional challenge under the Fourteenth Amendment of annexation by municipal corporations; and (3) *res judicata*.

SPECIFICATIONS OF ERRORS TO BE URGED

The United States Court of Appeals for the Sixth Circuit erred in holding that:

(1) this was a suit under 42 U.S.C. 1983 and could not be maintained against respondent City and respondent Attorney General of Tennessee, because neither respondent is a "person" within the meaning of that statute;

(2) *Hunter* v. *City of Pittsburgh*, 207 U.S. 161 (1907), precludes constitutional challenge under the Fourteenth

Amendment to the Constitution of the United States of annexation by municipal corporations;

(3) the doctrine of *res judicata* applied to this action;

(4) the summary action of the District Court in dismissing the complaint on motion was correct.

REASONS FOR GRANTING THE WRIT

The question raised in this case is of utmost importance, not only to this petitioner, but to millions of citizens and property owners in the United States whose properties are being annexed by various and sundry municipalities in this country. A move is afoot by practically every municipal corporation to extend its boundaries. A quotation from *Hunter* v. *City of Pittsburgh*, 207 U.S. 161 (1907) (A9), with respect to the fact that this Court had no jurisdiction over political questions is not pertinent to the issues raised herein, and the quotation has been misapplied by the United States Court of Appeals for the Sixth Circuit in the instant case, and by Courts of Appeals in other circuits. Under the holding in the instant case, and in other circuits, a citizen or corporation can make no complaint of being saddled with a pre-existing indebtedness of a municipality regardless of its magnitude, and cannot complain of taxes assessed on property to pay off this debt, from which no benefit was ever received. This is clearly a taking of property without due process of law, and a taking of property without just compensation. Furthermore, the decision in this case is contrary to the following decisions of this Court: *Kennedy* v. *Silas Mason Co.*, 334 U.S. 249; *Bell* v. *Hood*, 327 U.S. 678; *Mitchell* v. *Dakota Central Telephone Co.*, 246 U.S. 396.

Specification No. 1. The complaint does not aver that the suit was brought under 42 U.S.C. 1983, but the United

States Court of Appeals for the Sixth Circuit proceeds to set this section up as a "strawman" and then deliberately knocks it down with citations of authorities (A7).

The complaint was filed under 28 U.S.C. 1343(3), and the Fifth and Fourteenth Amendments to the Constitution of the United States. Clearly, the United States Court of Appeals is in error. 28 U.S.C. 2201 provides for the creation of a remedy in any court of the United States where there is a controversy within its jurisdiction, except with respect to federal taxes, with the court to declare the rights and other legal relations of any party seeking such declaration. whether or not further relief could be sought. The complaint in this case clearly comes under these two Code sections, because the suit was filed for violation of petitioner's rights under the Fifth and Fourteenth Amendments, as well as for redress because of the deprivation under color of State law and City ordinance of petitioner's rights, privileges and immunities secured by the Fifth and Fourteenth Amendments.

The decision of the Court of Appeals in this case clearly ignores petitioner's rights under these cited Code sections, and proceeds to cut off petitioner's rights by stating that the case is brought under a section of the Code that is absolutely not in point and not averred in the complaint as jurisdictional grounds for the action. The Court of Appeals erred in this respect for the further reason that the suit was not one seeking damages from any person. The authorities cited by the Court of Appeals on this ground in its opinion are wholly inapplicable to this suit, because neither respondent municipality nor the Attorney General of Tennessee was sued for damages.

Examination of the authorities cited by the United States Court of Appeals for the Sixth Circuit on this question, and

particularly the cases of *Douglas* v. *City of Jeanette*, 319 U.S. 157, and *Holmes* v. *City of Atlanta*, 350 U.S. 879, in which the Court cites as authority for its holding the decision of *Mayor & City Council of Baltimore City* v. *Dawson*, 350 U.S. 877, will show they are contrary to the proposition for which the Court cites them, and that they sustain the position of petitioner herein, wherein they hold that municipalities can be sued for deprivation of civil rights. The other cases cited by the Court of Appeals are inapplicable because they pertain to a municipality being sued for damages and the Courts there hold that municipalities have not waived governmental immunity against suits for damages. None of the cases cited by the Court of Appeals on this ground of its decision holds that a municipality may not be sued for deprivation of rights guaranteed under the Constitution of the United States. As a matter of fact, *Hunter* v. *City of Pittsburgh*, supra, relied upon by the Court for the broad proposition that a municipality cannot be questioned in any manner regarding annexation, expressly recognizes the right to sue a municipality for deprivation of rights guaranteed under the Constitution of the United States.

The effect of the decision of the Court of Appeals on this specification is to overrule the decision of this Court in *Baker* v. *Carr*, 369 U.S. 106. In *Baker*, this Court points out that the complaint clearly was brought under the Federal Constitution and that, as provided by Article III, Section 2 of the Constitution of the United States, jurisdiction of the federal courts extends to an action arising under the Federal Constitution.

Specification No. 2. Since this Court's decision in *Hunter* v. *City of Pittsburgh*, 207 U.S. 161, decided in 1907, when any question has been raised in any court regarding the legality of annexation by a municipality, *Hunter* has

been thrown up as an impenetrable "iron curtain" to make any question regarding the legality of such annexation. The decision of the United States Court of Appeals for the Sixth Circuit in the instant case does exactly that, again.

It is respectfully submitted that a careful analysis of *Hunter* will show it does not support the position taken by the District Court and affirmed by the Court of Appeals in the instant case, because the facts in *Hunter* were entirely different from the instant case, and the law of *Hunter* has long ceased to be the law of this Court and has been overruled. For this reason, *Hunter* will be analyzed.

In *Hunter,* a statute of Pennsylvania was involved, which permitted annexation by a larger municipality of a contiguous smaller municipality. The exact Pennsylvania statute in question is copied verbatim by Mr. Justice Moody, who wrote the decision in the case, in his preliminary statement of the case antecedent to the opinion. The case involved annexation by the City of Pittsburgh of the City of Allegheny. The complaint in the case, in the form of a petition, was brought by certain property owners alleging a violation of Article I, Section 10, of the Constitution, respecting the impairment of obligations of contracts. Complaint was made that the legislative act impaired the obligation of a contract existing between the City of Allegheny and the plaintiffs-in-error, whereby the latter are to be taxed only for the governmental purposes of the City of Allegheny, and that the legislative attempt to subject them to taxes of the enlarged city violated Article I, Section 9, Clause 10 of the Constitution of the United States. The assertion of the plaintiffs-in-error had its bottom upon the novel proposition that there existed a contract between citizens and taxpayers of a municipal corporation and the corporation itself, and that the citizens and taxpayers shall be taxed only for the uses of that particular corporation

[City of Allegheny] and shall not be taxed for the uses of any like corporation with which it may be consolidated. It was not averred that the City of Allegheny expressly made such a contract, but that the contract arose out of the relation of the parties to each other. *Hunter* disposed of this by stating that no authority or reason in support of the proposition had been offered, and that it is utterly inconsistent with the nature of municipal corporations and the purposes for which they are created and the relation they bear to those who dwell and own property within the corporate limits. This assignment was disposed of with the simple statement that the proposition tendered was just not true.

The other proposition upon which *Hunter* passed is the assertion by plaintiffs-in-error that they were being deprived of their property without due process of law by reason of said property being subjected to the burden of additional taxes resulting from consolidation. The manner in which due process of law was alleged to have been violated consisted of the method of voting on consolidation prescribed in the Pennsylvania act, which permitted voters of the larger city to overpower the voters of the smaller city. On this proposition the Court then gave its pronouncement which has been seized upon by the District Court and the Court of Appeals in the instant case as permitting any and all annexation by a municipal corporation, in the following language:

> ". . . In all these respects the state is supreme, and its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may, by such changes, suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right,

> by contract or otherwise, in the unaltered or continued existence of the corporation or its powers, and there is nothing in the Federal Constitution which protects them from these injurious consequences. The power is in the state, and those who legislate for the state are alone responsible for any unjust or oppressive exercise of it."

It is important to note that in *Hunter* a motion was made in this Court to dismiss the case on the assertion that no federal question was involved. *This motion was overruled.* This is the same motion with which the Court is concerned in the instant case. *Hunter* expressly holds that a federal question was presented, in the following statement:

> "The defendant-in-error moved to dismiss the case because no Federal question was raised in the court below or by the assignment of errors, or, if any Federal question was raised, because it was frivolous. This motion must be overruled. The plaintiffs-in-error claimed that the act of assembly was in violation of the Constitution of the United States, and specially set up and claimed in the court below rights under several sections of that Constitution, and all their claims were denied by that court. These rights were claimed in the clearest possible words, and the sections of the Constitution relied upon were specifically named. The questions raised by the denial of these claims are not so unsubstantial and devoid of all color of merit that we are warranted in dismissing the case without consideration of their merits."

How then can it be argued that *Hunter* is authority for dismissing this complaint?

Further, in *Hunter,* unlike the instant case, the Pennsylvania statute called for a referendum vote of the residents of both the cities of Pittsburgh and Allegheny on the question of annexation, and provided that annexation would not be effective unless it was approved by a majority of the

voters in both cities. See Sections 1, 2, and 7 of the Pennsylvania act. No referendum of the people to be annexed is provided in that part of the Tennessee statute in question in the instant case, and the complaint avers this as a grievance.

In *Hunter,* the Pennsylvania statute also provided for a determination with respect to what would be owed by the people of the annexed area of the City of Allegheny and that of the people of the old area of the City of Pittsburgh after annexation, and prescribed a method whereby the citizens of Allegheny after annexation would not be subject to the payment of the pre-existing indebtedness of the old City of Pittsburgh. See Sections 8 and 9 of the Pennsylvania act. In the instant case, one of the chief complaints is that respondent and others similarly situated by annexation to the old City of Knoxville are saddled with the thirty-three million dollars pre-existing bonded indebtedness, the revenue from which bonded indebtedness had already been spent prior to annexation on projects, including operating expenses, from which those in the annexed area would or could receive no benefit.

In *Hunter,* the complaint was not dismissed on the motion predicated on the ground that no federal question was involved. The Court took jurisdiction of the case and decided it. In *Hunter,* it is held that this Court had nothing to do with the interpretation of the Constitution of Pennsylvania and that these questions were for the State courts of Pennsylvania to decide. It is further the holding of *Hunter* that the Fifth Amendment to the Constitution of the United States is not restrictive of State action but only of national or federal action. In *Hunter* this Court stated:

> ". . . We have nothing to do with the interpretation of the Constitution of the state and the conformity of the enactment of the assembly to that Constitution;

> those questions are for the consideration of the courts of the state, and their decision of them is final. The 5th Amendment to the Constitution of the United States is not restrictive of state, but only of national, action."

This has long ceased to be the law. *Gomillion* v. *Lightfoot,* 364 U.S. 339; *Baker* v. *Carr,* 369 U.S. 106; *Gideon* v. *Wainwright,* 372 U.S. 335; *Escobedo* v. *Illinois,* 378 U.S. 478; *Pointer* v. *Texas,* 380 U.S. 400.

In *Gomillion,* the Court held that a federal cause of action was stated upon the allegation that alterations in the boundaries of the town of Tuskegee, Alabama, disenfranchised Negroes in violation of the Fifteenth Amendment. In *Gomillion,* Justice Frankfurter, speaking for a unanimous court, with respect to *Hunter,* says:

> "These allegations, if proven, would abundantly establish that Act 140 was not an ordinary geographic redistricting measure even within familiar abuses of gerrymandering. . . 'The (Fifteenth) Amendment nullifies sophisticated as well as simple-minded modes of discrimination' . . . The respondents invoke generalities expressing the State's unrestricted power—unlimited, that is, by the United States Constitution—to establish, destroy, or reorganize by contraction or expansion its political subdivision to-wit cities, counties and other local units. We freely recognize the breadth and importance of this aspect of the State's political power. *To exalt this power into an absolute is to misconceive the reach and rule of this Court's decisions in the leading case of* Hunter v. Pittsburgh, 207 U.S. 161/ . . ." (pages 341-342) [Emphasis supplied].

One of the most important holdings in *Hunter,* however, hich was overlooked by the District Court and the Court Appeals in the instant case, is that the Court was careful point out that the taking of private property rights, such water works, electric systems, etc., was not presented as uestion by the record, and the Court did not pass on that

fundamental issue. This, together with the other matters heretofore set forth, distinguishes *Hunter* from the instant case. Hunter then holds that the taking of private property rights such as water works, electric systems, etc., would have presented a question under the Fourteenth Amendment because it would have been action of the State under color of authority whereby property is taken without due process.

In the instant case, the complaint clearly alleges a violation of private rights under the Fifth and Fourteenth Amendments, of which the federal courts have jurisdiction. This Court has held there must be no discrimination of the right of suffrage based on whether a voter lives in an urban or rural area, *Davis* v. *Mann,* 377 U.S. 678; *WMCA* v. *Lomenzo,* 377 U.S. 633; *Reynolds* v. *Sims,* 377 U.S. 533; nor can there be discrimination on the basis of the employment of a voter, *Davis* v. *Mann,* supra; nor whether the elector is in a particular class with peculiar sympathies, *Carrington* v. *Rash,* 380 U.S. 89; nor to a test which gives greater weight to the vote of one citizen over another, *Reynolds* v. *Sims,* supra.

The United States Court of Appeals for the Sixth Circuit in its decision in the instant case, states that *Hunter* cuts off consideration by federal courts with respect to imposition of pre-existing bonded indebtedness of the old city when *Hunter* cannot stand for any such proposition, because in Hunter the annexing statute provided that a separate tax district would be set up whereby citizens of the old city would pay a greater tax rate so as to retire the pre-existing bonded indebtedness, and the new residents would not be required to pay taxes toward retirement of the pre-existing bonded indebtedness.

Specification No. 3. This case was dismissed in the District Court on respondent City's motion, and the District

Court action was affirmed by the United States Court of Appeals for the Sixth Circuit.

The motion to dismiss filed by respondent City makes no plea of *res judicata,* but simply makes the one assertion, stated differently in two grounds, that the complaint does not present a federal question. The District Court in its Memorandum Opinion correctly sets forth that the City ordinance and State statute in question have been attacked in the State courts of Tennessee resulting in an adverse decision to the position of petitioner, and that this Court denied a petition for writ of certiorari to the Supreme Court of Tennessee. *State ex rel.* v. *City of Knoxville,* 211 Tenn. 271, 364 S.W.2d 898, 372 U.S. 914, 83 S.Ct. 728, 9 L.Ed. 2d 721, (1963); but, the United States Court of Appeals is incorrect in its decision that such action made the case subject to dismissal on the ground of *res judicata* (A10).

Aside from the fact that no issue of *res judicata* was ever raised in the instant case, the effect of the decision of the Sixth Circuit on this specification is to overrule this Court's holding in *Baker* v. *Carr,* 369 U.S. 106, and many other decisions where State court action has been subject to review by this Court.

It is axiomatic that the mere fact this Court denied certiorari does not make the decision of a State court the law of this Court. It has been held too many times to require citation that denial of certiorari by this Court is not adjudication of the question presented, nor is it an approval of the lower court's decision. See *Magnum Co.* v. *Coty,* 262 U.S. 159, 163; *Supreme Court Practice,* Second Edition, by Robert L. Stern and Eugene Gressman, BNA, Incorporated, 1954, at page 106; Letter from Chief Justice Hughes to Senator Wheeler, March 23, 1937, reprinted in 81 Cong. Rec. 2814-5 (1937); Address of Chief Justice Vinson before American Bar Association, Sept. 7, 1949, St. Louis Daily Record (Sept. 8, 1949, p. 1).

Examination of the opinion of the Supreme Court of Tennessee in *State ex rel.* v. *City of Knoxville,* supra, which was the State case questioning the legality of the annexation statute and ordinance involved in this case, shows that the federal questions raised were pretermitted by the Supreme Court of Tennessee and the case turned on an interpretation of the State statute. The decision of the Supreme Court of Tennessee plainly states it was being confined to the sole question of whether under the facts of the case, the conditions precedent set forth in 6-310 Tennessee Code Annotated had been met by showing that annexation was not unreasonable in consideration of the health, safety and welfare of the citizens and property owners of the territory sought to be annexed and the citizens and property owners of the municipality doing the annexing. The Supreme Court of Tennessee in that case did not pass even upon the constitutionality under the Tennessee Constitution of the State statute, with respect to the legality of imposing upon the newly annexed citizens and property owners the some thirty-three million dollars pre-existing bonded indebtedness of the old city. This question was not even discussed in the State Supreme Court opinion.

A case involving the Legislature of Tennessee dramatically shows the error of the United States Court of Appeals for the Sixth Circuit with respect to this specification. In *Kidd* v. *McCanless,* 200 Tenn. 273, the Supreme Court of Tennessee refused to require the Legislature of Tennessee to re-apportion itself. If the decision of the Sixth Circuit in the instant case is correct, then the matter of re-apportionment of the Legislature of Tennessee could not have been attacked later in a federal court, such as was done in *Baker* v. *Carr,* 369 U.S. 106. The Court of Appeals in the instant case attempts to distinguish its decision from that in *Baker* v. *Carr,* supra, by stating that the parties are different. In the instant case, it holds that action against respondent McCanless, Attorney General of Tennessee, is

an action against the State, but that in *Baker* v. *Carr*, where Carr was Secretary of State of the State of Tennessee, an action against Carr was not an action against the State.

The District Court in its Memorandum Opinion in the instant case devotes a considerable portion thereof to a recitation with respect to the litigation which was involved in the Supreme Court of Tennessee with respect to this annexation. It is obvious from a reading of the opinion that the District Court predicated its decision upon the assumption that the federal courts should not consider this cause any further, because the Supreme Court of Tennessee had held the annexation to be valid. This is certainly the position taken by the United States Court of Appeals for the Sixth Circuit in its decision, and it is respectfully submitted that this logic and reasoning is fallacious. If the legality of the annexation in the instant case had not been first tested by State court proceedings, petitioner would have been met in a motion to dismiss by the plea that the case was barred under the abstention doctrine, whereby a federal court stays proceedings while the suit is prosecuted in the State courts, on the possibility that the decision of the State court will make it unnecessary for a decision in the federal court. In *Detroit Edison Co.* v. *East China Township School District No. 3*, No. 17004, United States Court of Appeals for the Sixth Circuit, decided June 2, 1967 (Petition for Writ of Certiorari filed August 28, 1967, No. 543, October Term, 1967), this is exactly what the Court did. (Copy of opinion and decision of the United States Court of Appeals for the Sixth Circuit is annexed as appendix, at A20.)

Although not on all fours, *Detroit Edison* raised some of the same questions as raised here. The United States Court of Appeals for the Sixth Circuit in *Detroit Edison* states:

> "With respect to the constitutional issues concerning the debt assumption proceedings (i.e., that the pro-

cedures employed pursuant to state statute were violative of the due process and equal protection clauses of the Fourteenth Amendment, and that the tax imposed as a result thereof was so disproportionate to the benefits received as to amount to confiscation), the District Court's determination based on application of the abstention doctrine will be affirmed, although that court's conclusions on both these issues on the merits is also deemed correct."

(A27)

In *Detroit Edison*, the United States Court of Appeals for the Sixth Circuit says further:

"Federal courts generally asbtain from exercising jurisdiction in order to avoid conflict with the administration by a state of its own affairs."

(A28)

If there has been no proceeding with respect to annexation in the State courts, in the instant case, petitioner would have been met with the plea that it had failed to exhaust its remedies in the State courts; but having complied with both of these federal propositions of law, the Sixth Circuit says this compliance constituted *res judicata.*

Specification No. 4. In the first instance, *Hunter* v. *City of Pittsburgh, supra,* which is the case relied upon by the United States Court of Appeals for the Sixth Circuit for its decision in the instant case, plainly holds contrary to the decision in the instant case, because in *Hunter* the Court overruled a motion to dismiss predicated on the assertion that no federal question was involved and expressly held that a federal question was involved.

The decision of the Sixth Circuit in the instant case is contrary to the decision of this Court in *Baker* v. *Carr,* supra, wherein the Court points out that when the assertion is made that there is a failure to state a cause of action, as was done in the instant case by motion to dismiss, such as-

sertion calls for a judgment on the merits and not for dismissal for want of jurisdiction. In the instant case, the first ground of the motion of respondent City is that the complaint be dismissed for lack of jurisdiction. In *Baker*, the Court held:

> ". . . Dismissal of the complaint upon the ground of lack of jurisdiction of the subject matter would, therefore, be justified only if that claim were 'so attenuated and unsubstantial as to be absolutely devoid of merit,' (citing cases), or 'frivolous', (citing cases) . . ." 369 U.S. at 199.

The language of this Court in *Kennedy* v. *Silas Mason Co.*, 334 U.S. 249, at 256-257, is pertinent to the dismissal order in the instant case, wherein this Court says:

> "But summary procedures, however, salutary where issues are clear-cut and simple, present a treacherous record for deciding issues of far-flung import, on which this court should draw inferences with caution from complicated courses of legislation, contracting and practice.
>
> "We consider it the part of good judicial administration to withhold decision of the ultimate questions involved in this case until this or another record shall present a more solid basis of findings based on litigation or on a comprehensive statement of agreed facts."

In the instant case, dismissal on motion was such a summary procedure.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

WILLIAM EARL BADGETT
608 Bank of Knoxville Building
Knoxville, Tennessee
Counsel for Petitioner

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE, NORTHERN DIVISION

DEANE HILL COUNTRY CLUB, INC.,
VS
CITY OF KNOXVILLE and GEORGE F. McCANLESS, Attorney General, State of Tennessee.

Civil Action No. 5456

Memorandum on Motion to Dismiss Complaint

(Filed January 17, 1966)

This case is a prolongation of litigation by this plaintiff and others seeking to invalidate an ordinance of the City of Knoxville and the statute from which it stemmed. The ordinance annexed property owned by the plaintiff and other adjacent areas to the City of Knoxville, being No. 3050, became effective on or about November 1960. The ordinance was passed in accordance with Chapter 113 of the Public Acts of 1955, appearing now as Sections 6-309, et seq, Tennessee Code Annotated (as appears in the Tennessee Code, the statute has been amended since the passage of the ordinance and, therefore, the amendments do not apply).

On December 8, 1960, the plaintiff and others commenced action in a state trial court contesting the validity of this ordinance. This plaintiff was one of the parties to one of the cases so filed in state court, which case was consolidated with others raising the same question.

In the state case, the plaintiff raised substantially the same questions as are raised in this case. The trial judge

decided the case in favor of the City of Knoxville and dismissed the action. The case was appealed to the Supreme Court of Tennessee. On September 7, 1962, the Supreme Court affirmed the judgment of the trial court and on October 4, 1962 denied an application for a re-hearing. From the adverse judgment of the Supreme Court of Tennessee, the plaintiff and others made application to the Supreme Court of the United States for writ of certiorari. This writ was denied without comment. The opinion in the state case in the Supreme Court is reported as State v. City of Knoxville, 364 S.W.2d 898, 211 Tenn. 271. The order denying the application for the writ of certiorari is reported in 372 U.S. 914, 9 L. Ed. 2d 721, 83 S. Ct. 728. Thereafter, this plaintiff and others, with a different approach, filed in the state trial court a suit raising the same questions that had been settled by the Supreme Court of the State of Tennessee.

Upon application of the City of Knoxville, the Supreme Court of Tennessee issued an injunction inhibiting this plaintiff and others from further proceedings in the state case or from instituting any other actions or taking steps to thwart the judgment made by the Supreme Court of Tennessee. This injunction was issued May 4, 1963. This plaintiff seeks to surround the injunction and again litigate the same questions by instituting this suit, which was filed October 27, 1965.

The plaintiff requests the convening of a three-judge court to hear this case pursuant to 28 U.S.C. § 2281 and 28 U.S.C. § 2284. In denying this request, it is necessary to jump the gun and point out the reason for such denial, which is, that there is no federal question presented by the complaint.

The plaintiff's principal claim is that by annexing its property to the old area constituting the City of Knoxville there was placed on its property a lien which is in partial security for payment of debts of the City of Knoxville made and the proceeds expended before the annexation, thus taking its property without just compensation as provided by the Fifth Amendment.

The plaintiff also claims that the ordinance deprived it of its property without due process of law and denied the plaintiff equal protection of the law, as guaranteed by the Fourteenth Amendment.

The issue raised for decision is by motion of the City of Knoxville to dismiss the action.

It should be said that it was not deemed necessary to go further into details of the complaint because the law seems to be definitely settled that the annexation of lands to a city or town is purely a political matter, entirely within the power of the Legislature of the State to regulate. *Hunter* v. *Pittsburgh*, 207 U.S. 161, 52 L. Ed. 151, 28 S.Ct. 40; *Hammonds* v. *City of Corpus Christi, Texas*, 226 F.Supp 456 (1964); *Detroit Edison Co.* v. *East China Township School Dist. No. 3*, 247 F.Supp. 296 (1965) [Advance Sheet].

There is no need to burden this opinion with the pertinent quotation from the case of *Hunter* v. *Pittsburgh*, supra, as the quotation is included in both the district court cases above cited. In addition, in the case of *Detroit Edison Co.* v. *East China Township School Dist. No. 3*, supra, Chief U. S. District Judge Levin has pointed out that the law remains the same as announced in *Hunter* v. *Pittsburgh*, supra, particularly giving the reasons why the reapportionment cases do not change this law, and also settles the claim for relief by reason of a violation of civil rights where jurisdiction is set up by the provisions of 28 U.S.C. § 1343(3) (the

aintiff, by amendment to the complaint, added the civil hts theory as a claim for the relief sought).

The writer is in full accord with the reasoning, fortified citations of precedent, of Chief Judge Levin in the *Detit Edison Co.* case, supra, and is convinced that the consions therein settle this lawsuit. Therefore, it is entirely necessary to reiterate the same principles of law conned in Chief Judge Levin's opinion.

he law, as above determined, constitutes the reason for ng at the outset that the complaint presented no federal stion.

s heretofore stated, the Supreme Court of Tennessee definitely and finally adjudicated the ordinance in tion and the statute under which it was passed to be d. Thus the decision herein made is deemed fair play veen the delicate federal-state relations.

e motion of the City of Knoxville will be sustained. he situation is the same as to the other defendants, the k is directed to enter an order dismissing the complaint e 58; F.R.C.P.).

Leslie R. Darr
Senior United States
District Judge

No. 17135

United States Court of Appeals

FOR THE SIXTH CIRCUIT

(Filed June 16, 1967)

DEANE HILL COUNTRY CLUB, INC., *Plaintiff-Appellant,*
vs
CITY OF KNOXVILLE and GEORGE F. McCANLESS, ATTORNEY GENERAL OF TENNESSEE, *Defendants-Appellees.*

APPEAL from the United States District Court, Eastern District of Tennessee, Northern Division.

Decided June 16, 1967.

Before: CELEBREZZE and PECK, Circuit Judges, and McALLISTER, Senior Circuit Judge.

PECK, Circuit Judge. In 1960, the City of Knoxville, Tennessee, (the "City") annexed approximately 150 acres of land owned by plaintiff pursuant to Ordinance No. 3050. In this action, plaintiff attacks the ordinance and the state act authorizing said ordinance as unconstitutional under the Fifth and Fourteenth Amendments of the federal constitution.

The statutory provision pursuant to which Ordinance No. 3050 was adopted, section 6-309, Tenn. Code Anno., provides:

> "A municipality . . . upon its own initiative when it appears that the prosperity of such municipality and [affected] territory will be materially retarded and the safety and welfare of the inhabitants and property thereof endangered, after notice and public hearing, by ordinance, may extend its corporate limits by annexation of such territory adjoining its existing boundaries as may be deemed necessary for the welfare of the residents and property owners of the affected territory as well as the municipality as a whole. . . ."

The complaint charges that plaintiff's property has, as a result of the annexation, been subjected to liens for the payment of city taxes, the proceeds of which are and were partially applied to the City's preexisting bonded indebtedness. This allegedly constitutes a taking of plaintiff's property for public use without compensation, in violation of the Fifth Amendment. The complaint further alleges that the ordinance and statute in question deprives plaintiff of its property without due process of law and deprives plaintiff of equal protection of the law under the Fourteenth Amendment of the Constitution for the reasons that plaintiff was not represented on the City Council which enacted the ordinance; that plaintiff was afforded no voice or vote on the annexation proposal by means of referendum; that the statute empowers the City to withhold from the annexed area any and all municipal functions and services; and that the statute is invalid since it was enacted by a malapportioned Tennessee legislature. This latter contention was abandoned by plaintiff at oral argument before this court and it therefore will not be considered. Plaintiff requested that the City be enjoined from enforcement of Ordinance No. 3050 and that judgment be rendered against the City for the amount of taxes which were allegedly illegally exacted.

As the basis for federal jurisdiction, plaintiff relied solely on 28 U.S.C. § 1343(3), so-called Civil Rights jurisdiction. This section provides in pertinent part:

> "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: . . .
>
> "(3) To redress the deprivation, under color of any law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States. . . ."

Section 1343(3) being jurisdictional only, it was incumbent on plaintiff to direct the court to a "law" pursuant to which its suit was "authorized . . . to be commenced." Although plaintiff failed to do this, it may be surmised by the reference in its brief to *Baker* v. *Carr*, 269 U.S. 186 (1962), that plaintiff intended the action to be brought under 42 U.S.C.A. § 1983.

This section provides that:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

However, this statute is inapplicable in the present case. The Supreme Court held in *Monroe* v. *Pape*, 365 U.S. 167 (1961), that municipalities were not "persons" within the meaning of section 1983. Although the Court in *Monroe* was confronted with a case in which claimants sought damages against a municipal corporation, the Court seemingly settled the question of whether equitable relief against a

municipality could be obtained under Section 1983. In a footnote, the Court referred to *Douglas* v. *City of Jeanette,* 319 U.S. 157 (1943) and *Holmes* v. *City of Atlanta,* 350 U.S. 879 (1955), in which equitable relief had been sought against defendant municipalities under Section 1983. Noting that the question had not been raised in those cases, the Court stated, "Since we hold that a municipal corporation is not a 'person' within the meaning of § 1983, no inference to the contrary can any longer be drawn from those cases." *Monroe* v. *Pape, supra* at 191, n. 50. This court's decision in *Cuiksa* v. *City of Mansfield,* 250 F.2d 700 (1957), was also cited approvingly by the Court in the footnote mentioned. *Ibid.* See also *Wallach* v. *City of Pagedale,* 359 F.2d 57 (8th Cir. 1966); *Sheridan* v. *Williams,* 333 F.2d 581 (9th Cir. 1964); *Spampinato* v. *City of New York,* 311 F.2d 439 (2d Cir. 1962), *cert. denied,* 372 U.S. 980 (1963). Thus Title 42 U.S.C. § 1983 has no application to the claim alleged against defendant City of Knoxville.

Nor can this action be maintained against defendant McCanless, Attorney General of the State of Tennessee, under Section 1983. Clearly the State of Tennessee is not liable as a "person" within the meaning of this section (See e.g., *United States ex rel. Lee* v. *State of Illinois,* 343 F.2d 120 (7th Cir. 1965)), and because section 1983 imposes liability only upon a person who "subjects, or causes to be subjected" any other person to the deprivation of rights secured by the Constitution, it is, briefly stated, the individual's conduct which forms the basis of liability. "The Act prescribes two elements . . . (1) the *conduct* complained of must have been done by some person acting under color of law; and (2) such *conduct* must have subjected the complainant to the deprivation of rights. . . ." *Basista* v. *Weir,* 340 F.2d 74, 79 (3d Cir. 1965) (Emphasis added). The complaint sets forth no conduct by defendant McCanless

which could possibly be construed as depriving plaintiff of any rights; it merely appears that McCanless was made a party defendant because a statute of Tennessee was claimed to be unconstitutional.

The District Court, relying on *Hunter* v. *City of Pittsburgh,* 207 U.S. 161 (1907); *Hammonds* v. *City of Corpus Christi,* 226 F. Supp. 456, *aff'd* 343 F.2d 162 (5th Cir.), *cert. denied,* 382 U.S. 837 (1965); and *Detroit Edison Co.* v. *East China School District,* 247 F. Supp. 296 (recently affirmed by this court, ——F.2d—— (1967)), for the principle "that the annexation of lands to a city or town is purely a political matter, entirely within the power of the legislature of the State to regulate," sustained the City's motion to dismiss the complaint.

In *Hunter* v. *City of Pittsburgh, supra,* which was relied upon in both *Hammonds* and *Detroit Edison, supra,* the Court stated:

> "Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. . . . The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State. Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the State within the meaning of the Federal Constitution. The State, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All

> this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the State is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may by such changes suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right by contract or otherwise in the unaltered or continued existence of the corporation or its powers . . ."

It is clear, for the reasons set forth in *Detroit Edison Co.* v. *East China School District, supra,* that *Hunter* precludes constitutional challenge under the Fourteenth Amendment to annexations by municipal corporations of adjoining territories on the basis of the procedure employed or authorized by the state or because of the pecuniary repercussions in the form of the ordinary incidence of city taxation. It follows that the District Court properly dismissed the complaint herein.

In addition to the above, the judgment of the District Court should be affirmed as to defendant City on the ground of res judicata. That is, "appellant must abide the rule that a judgment upon the merits in one suit is res judicata in another where the parties and subject-matter are the same, not only as respects matters actually presented to sustain or defeat the right asserted, but also as respects any other matter which might have been presented to that end." *Grubb* v. *Public Utilities Comm.*, 281 U.S. 470 (1930). Here, as the District Court accurately concluded, "the Supreme Court of Tennessee has [as between the present plaintiff and defendant City] definitely and finally adjudicated the ordinance in question and statute under which it was passed to be valid."

In support of its motion to dismiss the complaint, the City through its attorney submitted to the District Court an affidavit and several certified exhibits. These documents establish, as reflected in the district judge's memorandum opinion, that the present plaintiff and others commenced an action in the state courts in 1960 for the purpose of voiding Ordinance No. 3050 and its enabling act. The trial court sustained the City's demurrer to portions of plaintiff's petition which raised many of the constitutional issues presented here, including the claim regarding the preexisting bonded indebtedness and the City's power to withhold municipal services from the annexed area. On September 7, 1962, the Supreme Court of Tennessee affirmed, 364 S.W.2d 898, 211 Tenn. 271 (1962), and the United States Supreme Court denied certiorari, 372 U.S. 914 (1963). Several individuals, including the chief stockholder of plaintiff, were subsequently enjoined by the Tennessee Supreme Court from interfering by further lawsuits with its decision of September 7, 1962.

State courts are competent to decide questions arising under the federal constitution, and federal courts most assuredly do not provide a forum in which disgruntled parties can re-litigate federal claims which have been presented to and decided by state courts. See *Grubb* v. *Public Utilities Comm., supra; Lavasek* v. *White,* 339 F.2d 861 (10th Cir. 1965); *Chirillo* v. *Lehman,* 38 F. Supp. 65 (S.D. N.Y. 1940), *aff'd,* 312 U.S. 662 (1941). Cf. *Angel* v. *Bullington,* 330 U.S. 183 (1947); *Tomiyasu* v. *Golden,* 358 F.2d 651 (9th Cir. 1966).

Plaintiff raises several objections to application of the doctrine of res judicata, all of which are without merit. First, the contention that the federal questions "if raised, were entirely pretermitted by the Supreme Court of Ten-

nessee" is inaccurate. See *State ex rel. Stall* v. *City of Knoxville*, 211 Tenn. 271, at 276.[1] In addition, "the question of the constitutional validity of the [ordinance and statute] . . . was distinctly presented by the appellant's petition and necessarily was resolved against him by the judgment . . . Omitting to mention that question in the opinion did not eliminate it from the case or make the judgment of affirmance any the less an adjudication of it." *Grubb* v. *Public Utilities Comm.*, *supra* at 477-78. Secondly, after quoting at length from *Stern & Gressman, Supreme Court Practice*, plaintiff argues that the denial of certiorari does not make the lower court's decision the law of the Supreme Court. While this is of course true with respect to the value of a case as precedent, the relevant fact here is that the parties have had their day in court[2] and the denial of certiorari merely signifies that appellate review has been exhausted. Next, plaintiff argues that the Tennessee Supreme Court decision is not final on the federal questions raised herein, as illustrated by the fact that the Tennessee Supreme Court refused to require reapportionment in *Kidd* v. *McCanless*, 200 Tenn. 273 (1956) although the decision in

1. "Relators cite as error the action of the Trial Judge in sustaining demurrers to their attacks on the constitutionality, under both the State and Federal Constitutions, of the ordinances and the statutes under which they were passed. We think the action of the Trial Court was proper in this regard. The constitutionality of the statute was upheld in Witt v. McCanless, 200 Tenn. 360, 292 S.W.2d 392, and again in Morton v. Johnson City, 206 Tenn. 411, 333 S.W.2d 924, and was considered established in Knoxville v. State ex rel. Graves, 207 Tenn. 558, 341 S.W.2d 718. These cases established the constitutionality of the statute in question and, therefore, if these ordinances under attack meet the requirements of the statutes they are valid and constitutional."

2. Although plaintiff's suit in the state court was "in the nature of quo warranto" under section 6-310, Tenn. Code Anno., it is the aggrieved property owners, not the District Attorney General, who bring and control suits thereunder in their own name. See *State ex rel. Southerland* v. *Town of Greeneville*, 201 Tenn. 133 (1956). There are thus no special circumstances which would render application of the doctrine of res judicata inappropriate here.

the federal courts on the same issue was contra in *Baker* v. *Carr, supra.* The simple answer is that "the same" parties were not involved in both cases. Finally, plaintiff contends that had it not brought suit in the state court to test the legality of the annexation, it would have been barred in the federal courts under the abstention doctrine. In one of the cases cited by plaintiff in support of this contention, *England* v. *Louisiana Medical Examiners,* 375 U.S. 411 (1964), the Court recognized that a party has a right to fully litigate his federal claims in a federal court rather than a state court, and that this right, by appropriate reservation, could be preserved upon application of the abstention doctrine. However, the Court further noted that a plaintiff who unreservedly litigates his federal claim in a state court may forego his right to return to the district court. The Court explicitly held "that if a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there, and then has them decided there, then—whether or not he seeks direct review of the state decision in this Court—he has elected to forgo his right to return to the District Court." *Id.* at 419. Plaintiff's contention on this point is thus without merit.

For the foregoing reasons, the judgment of the District Court dismissing the complaint herein is affirmed.

Tennessee Code Annotated

6-308. Annexation of territory—Definitions.—As used in §§ 6-308—6-320, (a) "municipality" or "municipalities" shall mean any incorporated city or cities, or town or towns, and shall not include any utility district, sanitary district, school district, or other public service district, whether organized under public or private acts, (b) the terms "larger" and "smaller" shall refer to population and not to area, and (c) the term "notice" shall mean publica-

tion in a newspaper of general circulation in the municipality at least seven (7) days in advance of a hearing.

6-309. Annexation by ordinance.—A municipality when petitioned by a majority of the residents and property owners of the affected territory, or upon its own initiative when it appears that the prosperity of such municipality and territory will be materially retarded and the safety and welfare of the inhabitants and property thereof endangered, after notice and public hearing, by ordinance, may extend its corporate limits by annexation of such territory adjoining its existing boundaries as may be deemed necessary for the welfare of the residents and property owners of the affected territory as well as the municipality as a whole, provided said ordinance shall not become operative until thirty (30) days after final passage thereof.

Provided, however, that before any territory more than one-fourth (1/4) square mile in area or having a population of more than five hundred (500) persons may be annexed under this section, the governing body of the municipality shall adopt a plan of service setting forth at a minimum the identification and projected timing of municipal services proposed to be extended into the territory proposed to be annexed. Provided, further, that before any such plan of service shall be adopted, it must have been submitted to the local planning commission, if there be such, for study and a written report, to be rendered within ninety (90) days after such submission, unless by resolution of the governing body a longer period is allowed.

6-310. Quo warranto to contest annexation ordinance.—Any aggrieved owner of property lying within territory which is the subject of an annexation ordinance prior to the operative date thereof, may file a suit in the nature of a quo warranto proceeding in accordance with §§ 6-308—

6-320 and chapter 28 of title 23, to contest the validity thereof on the ground that it reasonably may not be deemed necessary for the welfare of the residents and property owners of the affected territory and the municipality as a whole and so constitutes an exercise of power not conferred by law.

If more than one (1) suit is filed, all of them shall be consolidated and tried as one (1) in the first court of appropriate jurisdiction in which suit is filed. Suit or suits, shall be tried on an issue to be made up there, and the question shall be whether the proposed annexation be or be not unreasonable in consideration of the health, safety and welfare of the citizens and property owners of the territory sought to be annexed and the citizens and property owners of the municipality. Should the court find the ordinance to be unreasonable, an order shall be issued vacating the same. In the absence of such finding an order shall be issued sustaining the validity of such ordinance, which shall then become operative thirty-one (31) days after judgment is entered unless an abrogating appeal has been taken therefrom.

If on appeal judgment shall be against the validity of such ordinance an order shall be entered vacating the same; otherwise, it shall become operative forthwith by court order and shall not be subject to contest or attack in legal or equitable proceeding for any cause or reason, the judgment of the appellate court being final.

Should the territory hereafter sought to be annexed be the site of substantial industrial plant development, a fact to be ascertained by the court, the municipality shall have the burden of proving that the annexation of the site of the industrial plant development is not unreasonable in consideration of the factors above mentioned, including the ne-

ty for, or use of municipal services by the industrial
t or plants, and the present ability and intent of the
icipality to benefit the said industrial plant develop-
by rendering municipal services thereto when and as
ed. The policy and purpose of this provision is to pre-
annexation of industrial plants for the sole purpose of
asing municipal revenue, without the ability and in-
to benefit the area annexed by rendering municipal
ces, when and as needed, and when such services are
sed or required by the industrial plants.

Ordinance No. 3050

N ORDINANCE TO ANNEX CERTAIN TERRI-
ORY GENERALLY KNOWN AS BEARDEN,
EAN HILLS, WEST HILLS, WESTMORELAND,
OTHERWOOD, ROCKY HILL AND TO INCOR-
ORATE SAME WITHIN THE CORPORATE
OUNDARIES OF THE CITY OF KNOXVILLE,
ENNESSEE.

EREAS, a public hearing before this body was held
7th day of November, 1960, pursuant to a resolution
d on October 25, 1960, the notice thereof published
Knoxville News-Sentinel on October 28, 1960; and

EREAS, it now appears that the prosperity of the
f Knoxville, and the territory hereinafter described
e materially retarded and the safety and welfare of
habitants and property thereof endangered if said
ry is not annexed; and

EREAS, the annexation of such territory is deemed
ary for the welfare of the residents and property
s of said territory, and the City of Knoxville as a

NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF KNOXVILLE:

SECTION L: That pursuant to authority conferred by Sections 6-308—6-319, Tennessee Code Annotated (Chapter 113, Public Acts of Tennessee, 1955, as amended) there is hereby annexed to the City of Knoxville, Tennessee, and incorporated within the corporate boundaries thereof, the following described territory adjoining the present corporate boundaries, to-wit: Situated in the 5th and 6th Civil Districts of Knox County, Tennessee—

Beginning at a point on the north right-of-way of Middlebrook Pike with its intersection with the city limits, thence following along the north side of Middlebrook Pike in a westwardly direction for a distance of approximately 13,800 feet to the west right-of-way of Amherst Road; thence in a westwardly direction following along the western and southern right-of-way of Amherst Road for a distance of approximately 6400 feet to a point on the south side of Amherst Road at the east right-of-way of the TVA power line, which point is located approximately 300 feet east of the east right-of-way of Francis Road; thence in a southerly direction a distance of approximately 800 feet to a point on the north right-of-way of Seaver Drive; thence leaving Seaver Drive and the power line and going in a southwestwardly direction in a straight line a distance of approximately 8900 feet to a point on the east right-of-way of Robinson Road, said point being 200 feet north of the north right-of-way of Middlebrook Pike; thence southwestwardly paralleling Middlebrook Pike 200 feet northwest of the northwest right-of-way line of Middlebrook Pike a distance of approximately 1600 feet to a point 200 feet west of the intersection of Middlebrook Pike and Mars Hill Road; thence following 200 feet west of and parallel with Mars Hill Road a distance of approximately 3200 feet in a southerly direction to a point where Ten Mile Creek crosses Walker Springs Road; thence in a southerly direction 200

feet west of and parallel with Walker Springs Road a distance of 3500 feet to a point on the north side of Kingston Pike, said point being 200 feet west of the intersection of Walker Springs Road and Kingston Pike; thence crossing Kingston Pike and following 200 feet west of and parallel with the west right-of-way of Gallaher View Road a distance of approximately 3000 feet to a point on the west right-of-way of Gleason Drive which is approximately 300 feet south of the intersection of Gallaher View Road and Gleason Drive; thence following 300 feet south of and parallel with Gleason Drive a distance of approximately 8300 feet in an eastwardly direction to a point 200 feet west of Morrell Road; thence following 200 feet west of and parallel with the west right-of-way of Morrell Road in a southerly direction a distance of 8000 feet to a point on the south side of North Shore Drive, said point being 200 feet west of the west right-of-way of Wrights Ferry Road and 200 feet south of the south right-of-way of North Shore Drive; thence following 200 feet south of and parallel with North Shore Drive a distance of approximately 9500 feet to a point in the center line of the Fourth Creek Embayment, said point being approximately 250 feet north of the east right-of-way of Lyons Bend Road and 200 feet east of North Shore Drive; thence eastwardly along the center of the embayment of Fourth Creek and crossing Fort Loudoun Lake a distance of approximately 5000 feet to a point on the eastern shore of the old channel of the Tennessee River; being the intersection of the 5th, 6th, and 9th Civil Districts; thence in a northerly direction in Fort Loudoun Lake following the boundary line between the 5th and 9th Civil Districts a distance of approximately 5400 feet to a point 200 feet south of an extension of the city limit line, said point being approximately 1400 feet south of Lyons View Pike; thence following in a northerly direction along the city limit line as extended into Fort Loudoun Lake and continuing along the city limit line in a northerly direction a distance of approximately 2100 feet to a point on the south side of Old Kingston Pike; thence continuing

along the city limit line in a westwardly direction approximately 800 feet to a point where Old Kingston Pike crosses the Southern Railway; thence continuing along the city limit line for a distance of approximately 1700 feet in a northerly direction to the south side of Sutherland Avenue; thence continuing along the city limit line in an eastwardly direction, following the south right-of-way of Sutherland Avenue for a distance of approximately 6300 feet to a point where Third Creek crosses under Sutherland Avenue; thence continuing along the city limit line in a northerly direction a distance of approximately 3900 feet to the point of beginning.

SECTION 2: That this ordinance shall become operative thirty (30) days after its final passage, as provided by Section 6-309, Tennessee Code Annotated.

SECTION 3: BE IT FURTHER ORDAINED, That this ordinance shall take effect seventeen (17) days from and after its passage, the welfare of the City requiring it.

/s/ John J. Duncan
Presiding Officer of the Council

/s/ Nessie M. Buler
Recorder

No. 17004

United States Court of Appeals

FOR THE SIXTH CIRCUIT

(Filed June 2, 1967)

THE DETROIT EDISON COMPANY, RALPH WERTZ and HERBERT KNACK,
Plaintiffs-Appellants,
v.
EAST CHINA TOWNSHIP SCHOOL DISTRICT NO. 3, DONALD MACDONALD, LELAND SASS, MARY PHILLIPS, MILTON J. GEARING, EDWIN H. LINDOW, MALCOLM G. SIMONS and WILLIAM HOPSON, Individually and as Members of the Board of Education of said School District,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided June 2, 1967.

Before: Phillips and Peck, Circuit Judges, and Cecil, Senior Circuit Judge.

Peck, Circuit Judge. Plaintiffs-appellants sought a declaration pursuant to 28 U.S.C. § 2201 that the annexation of two larger school districts to the school district in which they owned property violated the Fourteenth Amendment of the federal constitution, and that the assumption of the bonded indebtedness of the two annexed school districts by the combined district violated both the federal constitution and state law.

At all times relevant hereto, plaintiffs owned property within East China Township School District No. 3 (herein-

after "East China"), in St. Clair County, Michigan. Prior to 1960, East China embraced an area of 12 square miles, had 900 electors, a relatively small outstanding bonded indebtedness and a total property assessment for taxation purposes of approximately $82 million, the overwhelming proportion of which could be attributed to the power plant of Detroit Edison Company. Adjacent to East China was Marine City Community School District No. 7 (hereinafter "Marine City"), which embraced an area of 51 square miles, had 3800 electors, a relatively high outstanding bonded indebtedness and a total property assessment for taxation purposes of approximately $19.5 million. Also adjacent to East China was the School District of the City of St. Clair (hereinafter "St. Clair") which embraced an area of 27 square miles, had 4538 electors, a relatively high outstanding bonded indebtedness and a total property assessment of approximately $18.7 million.

In 1961, East China annexed both Marine City and St. Clair, the combined district thereafter being operated as a single, integrated unit. The annexations were made pursuant to the Michigan School Code (CLS 1961 § 340.1 et seq. (Michigan Statutes Annotated § 15.3001 et seq.)) which in pertinent part provided for school district annexations upon the approval of the State Superintendent of Public Instruction, the affirmative vote of the school electors in the annexed district and the affirmative vote of the board of education of the annexing district. The Michigan Supreme Court, in *Detroit Edison Co.* v. *East China School District,* 366 Mich. 638 (1962), upheld the validity of the annexations in question as against plaintiff Detroit Edison's contention that the joinder of the districts should have been accomplished pursuant to the statutory consolidation provisions which would have required an affirmative vote by the electors in both the annexing and

annexed districts. The issues presented in the instant case were not raised in the state proceeding.

Subsequent to the annexations, the electors of the combined district voted to assume the high school bonded indebtedness of the former Marine City and St. Clair districts. The complaint alleges that the electors of original East China rejected the debt assumption proposal although it was approved by a majority of the voters of the combined district. Thus, with respect to the $2.8 million bonded liability, over 60 per cent was allegedly shifted to East China, a large portion of which fell on plaintiff-appellant Detroit Edison Co.

The plaintiffs in this case consist both of individual property owners of the original East China district (who had the statutory right to vote directly on the debt assumption proposals) and Detroit Edison, a New York corporation which obviously and admittedly did not have any voting right.

The complaint alleges that the statute which permitted the annexation and debt assumption proceedings is violative of the due process and equal protection clauses of the Fourteenth Amendment of the federal constitution because the individual plaintiffs were denied the right to vote on the annexation proposal and their voting power was debased and diluted since they were compelled to vote in common with other adversely interested electors on the debt assumption issue. Thus, say plaintiffs, they have been discriminated against and have had their voting franchise abridged as compared with that of electors in adjacent districts. The complaint also alleges that the statute as applied to all East China property owners, including the corporate plaintiff, violates the above mentioned provisions of the Fourteenth Amendment since their property

has been subjected to liens for the payment of the debts of others. Plaintiffs further contend that the tax burden imposed as a result of the debt assumption is so disproportionate to the benefits received as to amount to confiscation. Finally, plaintiffs contend that the debt assumption is invalid because the proceedings did not conform to state law. The specific relief requested was a declaration that the combined district had not assumed the bonded indebtedness of Marine City and St. Clair, that plaintiffs' property within the former East China district cannot be reached for the payment of such indebtedness, and that there has been no lawful annexation.

Upon defendants motion for summary judgment, based on the grounds that the court had no jurisdiction of the subject matter and that plaintiffs failed to state a claim upon which relief could be granted, the District Court dismissed the complaint, stating that "[T]he acts of which plaintiffs complain do not abridge any substantive rights secured to them by the federal constitution. The individual plaintiffs' suits do not meet the jurisdictional amount requirement in 28 U.S.C. § 1331a and are not within the scope of 28 U.S.C. § 1343(3); and even if the plaintiffs have a valid constitutional claim, this suit comes within the abstention doctrine."

This action allegedly arising under the Constitution, jurisdiction was based in part upon 28 U.S.C. 1331, federal question jurisdiction. The District Court held that neither of the individual plaintiffs averred the requisite $10,000 jurisdictional amount, since the actual tax or assessment rather than the value of the property affected by the tax (as claimed by plaintiffs) was determinative of this issue. On appeal, dismissal of the complaint on this ground is not challenged.

Jurisdiction was also predicated upon section 1343(3)[1] of Title 28, U.S.C., as the suit was based upon the Civil Rights Acts, 42 U.S.C.A. §. 1971 et seq.[2] The District Court held that this suit involving "essentially property claims" was not within the scope of section 1343(3) since the major purpose of Civil Rights jurisdiction is to redress the deprivation of constitutional rights which are incapable of pecuniary valuation. While the limitation suggested is derived from Justice Stone's concurring opinion in *Hague* v. *C.I.O.*, 307 U.S. 496 (1939), it is unnecessary for a final disposition of this case that the District Court's ruling on this issue be affirmed, it being merely observed that many courts, including this one, have taken what has been termed a "latitudinarian view." *Joe Louis Milk Co.* v. *Hershey*, 243 F. Supp. 351, 354 (N.D. Ill. 1965). See *Glicker* v. *Michigan Liquor Control Comm.*, 160 F.2d 96 (6th Cir. 1947); *Lewis* v. *City of Grand Rapids*, 356 F.2d 276 (1966), *cert. denied*, 385 U.S. 838 (1966); *Burt* v. *City of New York*, 156 F.2d 791 (2d Cir. 1946); *Cobb* v. *City of Malden*, 202 F.2d 701 (1st Cir. 1953); *McGuire* v. *Sadler*, 337 F.2d 902 (5th Cir. 1964).

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1. § 1343. CIVIL RIGHTS AND ELECTIVE FRANCHISE

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: . . . (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;"

2. In the District Court, plaintiffs did not specify the provision or provisions of the various Civil Rights Acts upon which they relied, citing only "sections 1971 to 1995 of Title 42," U.S.C.A. In the briefs filed with this court, plaintiffs cite no cases in support of their position and only the jurisdictional section (§ 1343(3)) is referred to. Clearly, many of the sections included in the reference to §§ 1971-95 inclusive of 42 U.S.C.A. are inapplicable in this case. Plaintiffs appear to rely on the allegations charging a conspiracy by defendants for the purpose of denying plaintiffs of the equal protection of the laws. However, section 1985(3), 42 U.S.C.A., which affords a remedy for those injured by such a conspiracy, only provides for the maintenance of an action at law for damages. See *McShane* v. *Moldovan*, 172 F.2d 1016, 1018 (6th Cir. 1949).

The District Court, relying principally on *Hunter* v. *Pittsburgh* (207 U.S. 161 (1907)) for the proposition that "any alteration of municipal boundaries is a matter within the complete discretion of the state and not confined by any rights secured by the federal constitution," held that the annexation procedure followed was a legislative matter not justiciable under the due process or equal protection clauses of the Fourteenth Amendment.

In *Hunter*, the City of Allegheny was consolidated with the City of Pittsburgh pursuant to an act of the State General Assembly. Consolidation was permitted by the act upon an affirmative vote of a majority of the voters within both municipal corporations. Although a majority of Allegheny voters opposed the consolidation and voted against it, the proposal passed, whereupon suit was commenced in the state courts. On appeal, the Supreme Court summarized the assignment of error pertinent here as follows (p. 177):

> "Briefly stated, the assertion is that the Act of Assembly deprives the plaintiffs in error of their property without due process of law, by subjecting it to the burden of the additional taxation which would result from the consolidation. The manner in which the right of due process has been violated . . . is that the method of voting on the consolidation prescribed in the Act has permitted the voters of the larger city to overpower the voters of the smaller city, and compel the union without their consent and against their protest."

The following established principles were dispositive of this contention (pp. 178-79):

> "Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. . . . The number, nature and duration of the powers conferred upon these cor-

porations and the territory over which they shall be exercised rests in the absolute discretion of the State. Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the State within the meaning of the Federal Constitution. The State, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the State is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may by such changes suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right by contract or otherwise in the unaltered or continued existence of the corporation or its powers. . . ."

Two other Circuits, the Fifth and Tenth, have had occasion to pass on cases where the constitutionality of a state annexation procedure was raised. As the District Court noted, both Courts of Appeals relied on *Hunter* v. *Pittsburgh* in affirming dismissals of their respective cases. In *Hammonds* v. *City of Corpus Christi*, 343 F.2d 162 (5th Cir.), *cert. denied*, 382 U.S. 837 (1965), the court found no error in the District Court's decision which dismissed the complaint on the ground, among others, that "the annexation of lands to a city has been held without exception to be purely a political matter, entirely within the power of the State legislature to regulate." And in *International*

Harvester Co. v. *Kansas City,* 308 F.2d 35 (1962), *cert. denied,* 371 U.S. 948 (1963) after quoting from *Hunter,* stated:

> "Neither the due process clause nor the concept of equal protection is available to persons seeking to obstruct the ordinary and necessary exercise of a state's political functions. . . ."

With respect to the annexation issue, plaintiffs reliance on the relatively recent apportionment cases is misplaced. The Court in *Reynolds* v. *Sims,* 377 U.S. 533, 554 (1954), for example, recognized that "all qualified voters have a constitutionally protected right to vote" (referring of course to the right to vote for a "candidate of one's choice" in a "representative government" system), and thus the Court, relying on the equal protection concept, limited the states' power to disregard population in defining political boundaries for election purposes. However, as the District Court noted, the reapportionment cases "create no constitutional rights in affected citizens concerning the *procedure* for creating or altering" any type of state district. The judgment of the District Court with respect to the annexation issue will hereinafter be affirmed; reference is made to the well reasoned opinion of District Judge Theodore Levin reported at 247 F. Supp. 296, wherein the cases of *Gomillion* v. *Lightfoot,* 364 U.S. 339 (1960) and *Carrington* v. *Rash,* 380 U.S. 89 (1965) are shown to be inapposite.

With respect to the constitutional issues concerning the debt assumption proceedings (i.e., that the procedures employed pursuant to state statute were violative of the due process and equal protection clauses of the Fourteenth Amendment, and that the tax imposed as a result thereof was so disproportionate to the benefits received as to amount to confiscation), the District Court's determination

based on application of the abstention doctrine will be affirmed, although that court's conclusions on both these issues on the merits is also deemed correct.

Federal courts generally abstain from exercising jurisdiction in order to avoid conflict with the administration by a state of its own affairs. See 1 *Barron & Holtzoff, Federal Practice and Procedure* § 64 (Wright ed. 1960). This policy is codified by the Johnson Act, 28 U.S.C. 1341, in the area of state taxation:

> "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

In *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U.S. 293 (1943), plaintiffs sought a declaratory judgment regarding the constitutionality of a state tax. The Court reiterated the principle that "scrupulous regard for the rightful independence of state governments . . . should at all times actuate the federal courts," the guideline being the reluctance to interfere with a state's "fiscal operations" or with "state internal economy and administration." *Id.* at 298. Although the relief sought in that case was, as here, non-coercive in nature, the Court, after noting the Johnson Act, stated that "those considerations which have led federal courts of equity to refuse to enjoin the collection of state taxes, save in exceptional cases, require a like restraint in the use of the declaratory judgment procedure." *Id.* at 299.

The above principles are applicable here. The issues raised by the debt assumption proceeding would, if decided in favor of plaintiffs, result directly or indirectly in avoidance of the state tax which was levied as a result of said debt assumption. Indeed, abstention is particularly appropriate in this case since the assumption proceeding

allegedly failed to conform to state law and since certain sections of the school code pursuant to which the proceedings were conducted allegedly contravened the state constitution. The federal constitutional claims may well be avoided altogether should resolution of the local law issues be dispositive of the case.

A state must, as a prerequisite to application of the abstention doctrine, provide a "plain, speedy and efficient" remedy for the claim asserted. The District Court's conclusion that Michigan does provide such a remedy to attack improper taxation is sound. Compiled Laws (1948) § 211.53 (Mich. Stat. Ann. § 7.97) permits a party to pay a state tax or assessment under protest, stating the reason therefor in writing, and then bring a suit for recovery within thirty days.

One further matter deserves mention at this point. Where, as here, a District Court determination of a constitutional issue is grounded on alternative holdings, one reaching the merits and the other sustaining abstention, it is susceptible of criticism. Because a District Court need not (indeed should not) reach the merits where abstention is proper, *Great Lakes Dredge & Dock Co.* v. *Huffman, supra* at 301-2, a decision based on such alternative holdings needlessly decides a constitutional issue. Such a decision is in the nature of an advisory opinion, the rendering of which should in the exercise of judicial restraint be avoided where possible. Confusion may be created by such holdings which may not clearly indicate whether the decision is on the merits or whether the case has been referred to the state court for its decision on the merits. The breadth of the District Court's decision may be subject to scrutiny in the state courts in the form of the defense of res judicata.

The judgment of the District Court with respect to the annexation issue is affirmed because plaintiffs have failed to state a claim upon which relief may be granted; and affirmed with respect to the debt assumption issues under an application of the abstention doctrine.